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No. 93-1502

In The

Supreme Court of the United States

October Term, 1993

ARTHUR BRADLEY SAMURA,

Petitioner,

vs.

KAISER FOUNDATION HEALTH PLAN, INC., THE PERMANENTE MEDICAL GROUP, INC. and KAISER FOUNDATION HOSPITALS, INC.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Must a *state* court construe a *state* statute that affords equitable remedies against unlawful business practices as prohibiting a health maintenance organization's contract provision if the provision is *impliedly* inconsistent with the federal Health Maintenance Organization Act?

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Statutes Cited:

Knox-Keene Health Care Service Plan Act of 1975, §§ 1340, *et seq.* 1, 2, 3, 6

California's Business and Professions Code, § 17200 ....*passim*

Health Maintenance Organization Act, 452 U.S.C. §§ 300e(b)(1), *et seq.* .....*passim*

Respondents Kaiser Foundation Health Plan, Inc., The Permanente Medical Group, Inc. and Kaiser Foundation Hospitals respectfully request that this Court deny the petition for writ of certiorari submitted by Arthur Bradley Samura seeking review of a decision by the California Court of Appeal, First Appellate District, Division One.

STATEMENT OF THE CASE

Respondent Kaiser Foundation Health Plan, Inc. (Health Plan) is a non-profit California health maintenance organization (HMO) licensed under California's Knox-Keene Health Care Service Plan Act of 1975, §§ 1340, *et seq.*, Health and Safety Code (Knox-Keene Act). This act comprehensively regulates the business and contracts of HMOs in California and is administrated by the California Department of Corporations. Health Plan contracts with respondents The Permanente Medical Group, Inc. (Medical Group) and Kaiser Foundation Hospitals (Hospitals) to provide medical and hospital services to its members. The terms and conditions of a member's health care coverage are set forth in a medical and hospital service agreement (service agreement) entered into between Health Plan and the member, or the member's employer, union or other sponsoring organization.

The service agreements contain certain standard limiting conditions, including the third party liability (TPL) provision. The TPL provision provides that if a member is treated by Medical Group or Hospitals for an injury or illness caused by a third party and thereafter recovers compensation for the injury, Health Plan may recoup the value of the health care services. Health Plan is entitled to a first priority lien on the recovered amount up to the value of the services. This value is determined on the basis of the fee schedule which applies to medical care rendered by Medical Group and Hospitals to patients who are not Health Plan members.

Petitioner Arthur Samura was injured in an automobile accident, and his injury was treated by Medical Group under the service agreement. Petitioner then sued and obtained a recovery from the third party tortfeasor. Health Plan initially requested payment under the TPL provision, then waived its claim according to its customary practice of reducing or waiving its TPL claims when a member's economic losses are disproportionately high in relation to the member's settlement recovery.

Petitioner sued Health Plan, Medical Group, and Hospitals, claiming that the TPL provision and Health Plan's administration of it violated § 17200 of California's Business and Professions Code. Section 17200 provides injunctive relief for unfair, deceptive, or unlawful business practices. Petitioner alleged that the TPL provision was unfair and deceptive. He also alleged that it was unlawful. The claim of unlawfulness purported to arise from a number of statutory and judicial sources, the principal one being the Knox-Keene Act. Petitioner included among these sources of unlawfulness the federal Health Maintenance Organization Act, 42 U.S.C. §§ 300e(b)(1), *et seq.* (HMO Act), which he claimed prohibited TPL provisions.

Contrary to petitioner's suggestion (Pet., p. ii), Health Plan, Medical Group, and Hospitals were the only entities involved in the case below. Contracts between affiliated Kaiser HMOs outside Northern California and their members have no connection to the lawsuit below. The suit below challenged only the TPL provision and practices of Health Plan's Northern California Region. It sought only to enforce California's Unfair Business Practices Act, a statute that has no effect on the practices of health care entities in states other than California.

Following a trial, the California Superior Court for the County of Alameda found that some aspects of the TPL provision violated various sections of the Knox-Keene Act and were therefore

enjoinable as an unlawful business practice under § 17200. The trial court ordered that Health Plan revise the provision and some of the implementing documents. The court also found, however, that the HMO Act did not expressly authorize or prohibit the TPL provision.

The evidence regarding petitioner's HMO Act theory consisted mostly of testimony from a former official of the division of the United States Department of Health, Education and Welfare (HEW), the predecessor of the Department of Health and Human Services (HHS), which regulated federally qualified HMOs under the HMO Act. This witness testified that it has been the consistent practice of HEW and HHS to approve of TPL provisions in the service agreements of federally qualified HMOs. Indeed, petitioner stipulated that neither HEW nor HHS has ever objected to a TPL provision in a federally qualified HMO's service agreement.

Health Plan appealed the order and petitioner cross-appealed. The California Court of Appeal for the First District, on August 17, 1993, issued the opinion that is the subject of the present petition. The Court of Appeal reversed the trial court's order in all respects, except that pertaining to the HMO Act. The court held that the TPL provision was not unfair, deceptive, or unlawful. The provision is facially valid, the court stated, because its enforcement is subject to traditional contract defenses like unconscionability and other limitations such as the requirement that Health Plan's claim be reduced to account for attorney's fees expended by the member in obtaining the recovery.

The court's other principal holding was that the trial court's order improperly infringed on the California legislative scheme for regulating HMOs by basing a violation of § 17200 on a finding of unlawfulness under certain sections of the Knox-Keene Act. These sections, the court held, did not define any unlawful acts, but rather

delegated and mapped out an on-going administrative responsibility for the California Department of Corporations. A statute that does not itself define unlawfulness, the court concluded, cannot be the basis for a violation of the unlawfulness prong of § 17200.

The Court of Appeal drew a similar conclusion with respect to the federal HMO Act. The court did not determine whether Health Plan's TPL provision may be the object of administrative action under the HMO Act. The court simply decided that the Act could not be used as a standard for finding a violation of § 17200 because there is "nothing in the statute or related regulations that declares a third party liability provision to be unlawful as a matter of substantive law." (App. 23). This holding is based on the Court of Appeal's interpretation of the "unlawfulness" prong of a *state* statute, *viz*, § 17200.

Petitioner's request for review by the California Supreme Court was denied.

REASONS FOR DENYING THE WRIT

Many reasons exist for denial of the present petition for writ of certiorari. Respondents limit this opposition to three reasons, each of which compels denial of the petition. First, there is no substantial federal question presented. Second, the decision of the California Court of Appeal rests exclusively on adequate and independent state grounds. Third, even if the Court determines that review is warranted as to the interpretation of the federal HMO Act, the Court should remand the case to the California Court of Appeal so that that court may decide whether § 17200 may be used to enjoin violations of the Act, an issue that court did not reach.

I.

THE PETITION PRESENTS NO FEDERAL QUESTION BECAUSE THE DECISION BELOW RESTS PRIMARILY ON INTERPRETATION AND APPLICATION OF A CALIFORNIA STATUTE.

The real issue posed by the present petition turns on an interpretation of a California state statute — not an interpretation of the federal HMO Act. There is no dispute that the federal HMO Act does not directly prohibit TPL provisions. Petitioner has always argued that such a prohibition should be *implied* from the goals of the federal statute and statutory provisions which do not expressly address the propriety of TPL provisions. In rejecting petitioner's federal HMO Act theory, the Court of Appeal did not probe and resolve the parties' debate over the correct, implied meaning of the Act. Rather, the Court of Appeal simply held that the "unlawfulness" prong of § 17200, California Business and Professions Code, can be invoked only on the basis of an explicit statutory prohibition, a prohibition that is nowhere to be found in the federal HMO Act. Because this holding is based on an interpretation of a California statute, the petition does not present a substantial federal question.

By its principal holding, the Court of Appeal merely added to the well-developed jurisprudence of California's unfair business practices laws the logical principle that the unlawfulness prong of § 17200 "borrows" only statutes and regulations which specifically declare certain conduct to be unlawful. The federal HMO Act and its implementing regulations by their terms do not declare TPL provisions unlawful. Therefore, the Court of Appeal reasoned, § 17200 cannot "borrow" the Act to enjoin TPL provisions as unlawful business practices.

Before the Court of Appeal, petitioner argued that previous

§ 17200 cases had allowed relief under that section to combat practices that were also subject to administrative enforcement under the "borrowed" statute or regulation. According to petitioner, the existence of a dual enforcement mechanism did not preclude a court from finding and rectifying a violation of § 17200. The Court of Appeal, however, explained that such dual enforcement may be allowed, and § 17200 invoked, only where a statute or regulation expressly prohibits specified conduct. The court accordingly held that § 17200 cannot be used to enforce a statute or regulation that does not define unlawful conduct but rather sets out guidelines and objectives that govern the administrative agency's exercise of its discretionary enforcement powers.

The Court of Appeal declared that courts cannot, in the guise of enforcing § 17200, construe the applicable statutes or regulations to achieve their regulatory objectives when that task has been expressly delegated to an administrative agency. If and when the agency promulgates a regulation declaring certain conduct unlawful, that regulation can then serve as a basis for § 17200 relief. Until the agency does so, however, a court cannot do so merely by the authority of § 17200.

The Court of Appeal did not interpret or apply the federal HMO Act. As it did in its review of the Knox-Keene Act, the Court of Appeal merely looked to see if TPL provisions are explicitly outlawed by the HMO Act and its implementing regulations. Nothing in the federal Act prohibits TPL provisions. HHS has chosen neither to mandate nor prohibit them in its regulations. The Court of Appeal, therefore, concluded that the Act did not provide a basis for finding that the TPL provision is an unlawful business practice under § 17200.

The HMO Act was involved in the case below only to the extent petitioner sought to use it as a standard for application of a

state statute, § 17200. Petitioner did not seek to enforce the Act, which he may not do in any event, since it provides neither an express nor an implied private right of action. *E.g., Health Care Plan, Inc. v. Aetna Life Ins. Co.*, 966 F.2d 738 (2d Cir. 1992); *UAW v. Ring Screw Works*, 741 F. Supp. 660, 663 (E.D. Mich. 1990). Petitioner's attempt to circumvent this prohibition through § 17200 does not create a federal question.

The case below has no effect on administrative enforcement of the Act, because the Court of Appeal specifically deferred to HHS for interpretation and enforcement of the Act. The case also has no effect on claims brought under other statutes that are claimed to "borrow" the HMO Act. Indeed, the case does not preclude future claims under § 17200 seeking to "borrow" the Act to the extent that it does define unlawful activity. The issue resolved by the Court of Appeal was a very narrow question of state law. The case below therefore does not present a substantial federal question.

II.

THE COURT OF APPEAL'S DECISION RESTS ENTIRELY ON ADEQUATE AND INDEPENDENT STATE GROUNDS RELATED TO INTERPRETATION AND APPLICATION OF § 17200.

For the reasons described above in Point I., the only ground necessary for the Court of Appeal's decision below was the court's interpretation of the unlawfulness prong of § 17200. The federal HMO Act was invoked by petitioner and summarily addressed by the Court of Appeal merely as a possible standard for application of § 17200 to the TPL provision. On the basis of its general holding as to the types of statutes and regulations on which a violation of § 17200's unlawfulness prong may rest, the Court of Appeal affirmed the trial court's finding that the Act did not provide such a standard.

Thus the Court of Appeal based its decision on California's § 17200. There are no federal grounds at all for the decision, let alone any "inextricably interwoven" with state grounds. Since it is thus "clear from the opinion itself" that the Court of Appeal relied upon an adequate and independent state ground and that it did not rest its decision "primarily on federal law," there is no basis for the Court to review the decision by writ of certiorari. *See Michigan v. Long*, 463 U.S. 1032 (1983).

Petitioner acknowledges that the federal HMO Act does not provide an implied private right of action. That the federal Act is enforceable only by HHS reinforces the fact that petitioner merely sought to use the Act as a standard for application of § 17200. Petitioner sued under § 17200 and lost because of the Court of Appeal's interpretation of this state statute.

III.

IF THE COURT DETERMINES THAT REVIEW IS WARRANTED REGARDING INTERPRETATION OF THE HMO ACT, THE COURT SHOULD REMAND THE CASE FOR DECISION ON WHETHER VIOLATIONS OF THE ACT ARE ENJOINABLE UNDER § 17200.

Even if the Court determines that a federal question is presented that may be worthy of review, the Court should send the case back to the California Court of Appeal for a decision as to whether violations of federal regulatory statutes are enjoinable under § 17200. The California Supreme Court has held that an inferior state court should ordinarily decline to enforce federal statutes which create regulatory schemes that are enforceable only by federal administrative agencies. *See Department of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal. 3d 509, 523, 213 Cal. Rptr. 247 (1985), *cert. denied*, 465 U.S. 1045 (1986) (§ 17200 injunction inappropriate for violation of federal

highway law that delegated authority to Department of Interior). The Court of Appeal specifically elected not to decide this issue. If, on remand, that court decides that the federal HMO Act is not enforceable under § 17200, the question posed by the present petition will be moot.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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